

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANE MONTANEZ-DENMAN and DEPARTMENT OF
TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,
Des Plaines, IL

*Docket No. 98-1767; Submitted on the Record;
Issued August 29, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant established that she sustained an emotional condition in the performance of duty.

On October 31, 1997 appellant, then a 39-year-old air traffic control specialist, filed a notice of occupational disease and claim for compensation, alleging that she suffered from major depression, post-traumatic stress and anxiety as the result of continued harassment in the workplace and a hostile work environment. She stated that the employing establishment was unwilling to accommodate her allergies and prevent her exposure to chemicals, fumes and fragrances in the workplace, which caused her anxiety. Appellant also alleged that she was subjected to harassment by her supervisor, who refused to stop wearing cologne and other coworkers who ignored her because of her medical condition.¹

In a supplemental statement, appellant alleged that the employing establishment refused to notify her in advance that chemicals would be applied to the roof of the workplace. She stated that the employing establishment ignored her requests that coworkers not be allowed to wear perfumes around her, that deodorizers be removed from the restrooms and that there be installed a new air conditioner/air quality system. Appellant described a constant feeling of intimidation,

¹ The record reveals that appellant suffers from multiple chemical sensitivities and that the Office of Worker's compensation Programs accepted eight prior claims for chemical exposure (A9-436175, A9-433195, A9-428699, A9-423788, A9-423789, A9-421413, A9-420453 and A9-413981). Those prior claims were doubled by the Office with the instant claim under master claim number A9-433195.

anxiety and powerlessness because she could control neither her allergies nor her work environment.²

By letter dated November 24, 1997, the Office notified appellant of the factual and medical evidence required to establish her claim.

In a decision dated December 30, 1997, the Office denied compensation on the grounds that the evidence was insufficient to establish the fact of an occupational injury.

On February 9, 1998 appellant requested reconsideration and submitted additional evidence.

In conjunction with her reconsideration request, appellant submitted a binder with 68 tabs, the bulk of that material being relevant to her prior accepted claims. She submitted copies of performance appraisals, letters of commendation, a multi-page organizational assessment of the Cleveland Automated Flight Service Station operations, applications for leave, performance standards for supervisors, union newsletters pertaining to general complaints about management, studies of common chemicals found in fragrances conducted by the Environmental Protection Service and copies of federal court decisions and regulations

There were also several witness statements and affidavits contained in the binder.

In an undated witness statement, Harry Zilke, indicated that appellant's supervisor had told personnel in his department to quit wearing perfume to work, but that the supervisor, Sandra Denise, continued to wear perfume. Mr. Zilke thought that such action by Ms. Denise undermined the no perfume directive and caused appellant to be the subject of some ridicule. He stated that there were rumors going around about appellant but he did not specify the nature of the rumors. Mr. Zilke further stated "we are assaulted with jet fuel fumes and other chemicals on a regular basis" and that colognes or perfumes are worn on all shifts.

In a January 24, 1998 statement, Stephanie A. Napier, a coworker, advised that she was present at a labor management meeting on October 13, 1994 during which the union requested advance notice of the use of pesticides, chemicals and painting to be performed at the facility where appellant worked. Ms. Napier noted that the employing establishment did not comply with the request until June 1996. She also stated that several meetings were held to discuss alternate solutions for meeting appellant's accommodations. Ms. Napier indicated that the employing establishment did not follow through on whether a new HVAC system could be installed, that it did not explore whether appellant could work a different fragrance free shift, and that it did not comply with appellant's requests for advance notification of chemical exposure. She also noted that appellant's supervisor specifically refused to establish a fragrance free environment because she felt it was a violation of a persons civil rights.

In an undated witness statement, Nancy Holly, a coworker, described that employees knew that Ms. Denise had not stopped wearing perfumes although she had circulated a

² Appellant also described an instance where a coworker, Linda Johnson, deliberately went to the bathroom and applied a fragrance to irritate appellant.

memorandum advising that appellant was made sick by chemicals and strong fragrances and requesting that the employees refrain from wearing the same. She noted that on August 29, 1995 appellant's work area started to permeate with a strong perfume odor and that appellant became very upset. According to Ms. Holly, the strong perfume odor was not present until after the supervisor left. She also cited an occasion on October 31, 1995 when Ms. Denise followed her into an office where appellant was working and that Ms. Denise was wearing perfume. Ms. Holly suggested that Ms. Denise did not have to follow her and that she could have gone into appellant's office alone. Ms. Holly also expressed her belief that a fellow coworker, who was no longer working in appellant's office, had continued to enter that office in order to subject appellant to perfume.

In a decision dated March 17, 1998, the Office denied modification following a merit review.

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition while in the performance of duty.

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.³ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.⁴

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.⁵ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁶ An employee's charges that he or she was harassed or

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Sheila Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

discriminated against is not determinative of whether or not harassment or discrimination occurred.⁷ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁸

In the instant case, appellant has not established a compensable factor of employment. Although appellant contends that the employing establishment's failure or refusal to reasonably accommodate her allergies in the workplace constitutes harassment, the Board has previously noted that disability is not covered when it results from an employee's frustration in not being permitted to work in a particular environment.⁹ Appellant has not demonstrate that the employing establishment erred or acted abusively in administrative matters relating to her work environment. The decision as to whether the employing establishment will make any accommodations for a worker is an administrative matter and does not fall within the context of appellant's regularly assigned duties. Because the Board finds that the employing establishment did not err or act abusively in handling this administrative matter appellant has not carried her burden of proof to establish an employment factor in establishing her claim for an emotional condition.

Furthermore, appellant's allegation that her supervisor and other coworkers deliberately harassed her is not factually supported by the record. As noted by the Office in its March 17, 1998 decision, appellant submitted several affidavits to show that she was harassed "by all levels of personnel" but those affidavits indicate only that she was occasionally exposed to perfumes from coworkers and that the employing establishment held several meetings in an attempt to resolve the situation. The affidavits do not establish that the motives of the individuals cited were hostile or that the employing establishment completely ignored appellant's complaints.¹⁰

For harassment or discrimination to give rise to compensable disability under the Act, there must be some evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹¹ Because there is insufficient evidence from which to conclude that appellant was harassed, the Board concludes that the Office properly denied appellant's claim for compensation.

The decision of the Office of Workers' Compensation Programs dated March 17, 1998 is hereby affirmed.

⁷ *William P. George*, 43 ECAB 1159 (1992).

⁸ See *Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁹ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ The December 7, 1995 affidavit from Sylvia Phillips only speculates that a fragrance was sprayed maliciously on appellant. A January 28, 1998 affidavit by Ms. Napier notes that appellant filed a grievance against her supervisor for harassment in 1995, but there is no documentation of record as to the resolution of that alleged grievance by the union or the Equal Employment Opportunity.

¹¹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

Dated, Washington, D.C.
August 29, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member